Supreme Court, U.S.
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MAY 20 1993
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92-1850

No. _____

In The

Supreme Court of the United States

October Term, 1992

LARRY GENE CHILDS, JR.,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

On Petition For A Writ Of Certiorari To The Alabama Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION ONE

Whether the Trial Court and the Appellate Courts for the State of Alabama erred in denying the Petitioner a new trial on the basis that because of the unprofessional errors of the Petitioner's Trial Counsel:

1. The Petitioner was denied a fair trial and there is a reasonable possibility that the results of the proceeding at trial would be different; and,

2. The Petitioner's sentence was fundamentally unfair and there is a reasonable possibility that the Petitioner should not have been sentenced to a term of life imprisonment without the possibility of parole.

QUESTION TWO

Whether the use of a prior felony conviction entered without the benefit of counsel, but which is admitted to by the Petitioner at his trial can be used to enhance the sentence of the Petitioner.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF CASE 4

STATEMENT OF FACTS 6

REASONS FOR GRANTING THE WRIT:

QUESTION ONE 7

QUESTION TWO 14

CONCLUSION 17

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

United States Supreme Court Cases

Burgett v. Texas, 389 U.S. 109, 19 L.Ed.2d 319, 88 S.Ct. 258 (1967) 16

Johnson v. Zerbst, 304 U.S. 458, 82 L.Ed.2d 1461, 58 S.Ct. 1019 (1938) 16

Kimmelman v. Morrison, 477 U.S. 365, 91 L.Ed.2d 305, 106 S.Ct. 2574 (1986) 9

Lockhart v. Fretwell, 506 U.S. ___, 122 L.Ed.2d 180, 113 S.Ct. ___ (1993) 12, 13

Sandstrom v. Montana, 442 U.S. 510, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979) 10

Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2051 (1984) 5, 7, 12, 13, 14

United States Constitutional Provisions

Fourth Amendment 2, 9, 13

Fifth Amendment 3, 4, 13

Sixth Amendment ..... *passim*

Fourteenth Amendment 3, 4

State Statutes

Code of Alabama

Section 13A-8-41 4

Section 13A-5-9 5

Section 15-9-40 ..... 8, 9

Section 15-9-41 8

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

28 U.S.C. § 1257 1

RULES OF THE SUPREME COURT

Rule 10 1

OPINION BELOW

The order of the Alabama Court of Criminal Appeals is not yet officially reported and a copy of the order is appended to this petition. (App. 1-2).

JURISDICTION

This petition for review on writ of certiorari is presented under Rule 10 of the Rules of the Supreme Court of the United States in that there exists in this proceeding several rulings of the Trial Court which the Petitioner alleges are in conflict with the decisions of this Honorable Court and which rulings have been upheld, over the objection of the Petitioner by the Court of Criminal Appeals and where the Supreme Court for the State of Alabama has denied discretionary review.

The judgment of the Supreme Court of Alabama denying the Petitioner's Application for Certiorari to the Court of Criminal Appeals was entered on February 19, 1993. No motion for rehearing was filed. This Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), the Petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 10 of Rules of the Supreme Court provides in relevant part:

.1. A review on writ of certiorari is not a matter of right, but of discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Amendment IV to the United States Constitution

The right of the people to be secure in their persons, houses, papers, and effect, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment VI to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendments V and XIV to the United States Constitution

This petition involves the Fifth Amendment to the United States Constitution, which provides in relevant part:

> . . . nor shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law . . .

and the Fourteenth Amendment to the United States Constitution which provides in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF CASE

This case presents itself for review of the State Appellate Court's decision of a direct appeal from the denial of the Petitioner's Motion For New Trial from a Judgment of Conviction and Sentence of Life Without the Possibility of Parole entered by the Circuit Court of Calhoun County, Alabama in case CC90-931. After a trial by jury from March 18 through March 20, 1991, the Petitioner was found guilty and thereupon adjudged guilty of the Class A felony offense of Robbery 1st Degree, Section 13A-8-41, *Code of Alabama* (1975). The Judgment of Conviction was entered on March 20, 1991. (App. 13).

The Trial Court scheduled a hearing on sentencing which was held on August 1, 1991. The Petitioner did and does now object to the use of four prior felony convictions as the basis for sentence enhancement from a term certain to the sentence he received for Life Without the Possibility of Parole. (App. 5-7). The basis for the availability of the prior convictions for use as enhancement of the Petitioner's sentence was the Petitioner's admission at trial of his having these four prior felony convictions. This admission later formed the basis for sentence enhancement under Alabama's mandatory sentence enhancement rule from a term certain to Life Imprisonment Without the Possibility of Parole. Trial Counsel admitted at the hearing on Petitioner's Motion For New Trial that he was unaware that the Petitioner's prior convictions were entered without benefit of counsel. (App. 30-34). At that hearing the Petitioner objected to the sentence as violating the 5th, 6th, 8th, and 14th Amendments of the United States Constitution and objected on the same grounds to the use of uncounseled prior convictions

under Alabama's Habitual Felony Offender Act, Section 13A-5-9, *Code of Alabama* (1975) (App. 22) as it was being applied to the Petitioner. (App. 24-25). The Petitioner introduced a document entitled "Petition To Enter Plea of Guilty" (App. 14-21) which Petitioner argues shows that the plea was entered without either the benefit of counsel or a valid waiver of counsel. Notwithstanding said objection, the Trial Court entered a section of Life Imprisonment Without the Possibility of Parole. (App. 5-7). These issues were enumerated as error and argued to the Alabama Court of Criminal Appeals (App. 26) which affirmed the Trial Court's order for sentencing. (App. 1-2). The objections were renewed in the Supreme Court of Alabama in Petitioner's Application For Certiorari to the Alabama Court of Criminal Appeals. (App. 37-38). The Alabama Supreme Court denied certiorari. (App. 4).

The Petitioner filed a Motion For New Trial to the Circuit Court of Calhoun County, Alabama on the 29th day of August, 1991 (App. 27-29) raising issues under the 5th, 6th, 8th, and 14th Amendments to the United States Constitution, and in particular the Petitioner raised issues under *Strickland v. Washington*, 466 U.S. 668 (1984) pointing to Trial Counsel's performance at trial. The Trial Court overruled the motion by written order. (App. 8-12). The issues were enumerated as error and argued to the Alabama Court of Criminal Appeals (App. 26) and renewed in Petitioner's Application For Certiorari (App. 37-38) in the Alabama Supreme Court.

The Court of Criminal Appeals on the 13th day of November, 1992, in case number 91-899, affirmed by Memorandum (App. 1-2) the Judgment of Guilt and Sentence of Life Without Parole of the Petitioner's conviction

in the Circuit Court of Calhoun County, State of Alabama, in case number CC-90-931, *Larry Gene Childs, Jr. v. State of Alabama*. The Petitioner filed an Application for Rehearing on November 30, 1992, which was overruled by the Alabama Court of Criminal Appeals on the 30th Day of December, 1992. (App. 3).

The Petitioner shows that on the 19th day of February, 1993, the Supreme Court for the State of Alabama issued a Certificate Of Judgment, number 1920559, *Ex parte Larry Gene Childs, Jr.*, (App. 4) denying the Petitioner's Application for Writ of Certiorari to the Court of Criminal Appeals for the State of Alabama in cause number 91-899.

STATEMENT OF FACTS

In the Trial Court's "ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL" (App. 8-9) the Circuit Judge for Calhoun County, Alabama, gave the following recitation of facts in this case.

> "During the late evening hours of May 14, 1990, the Discount Food Mart #107 on Choccolocco Road in Anniston, Calhoun County, Alabama, was robbed by a white male. Taken in the robbery was an undetermined amount of cash and a six pack of Budweiser beer.
>
> On May 16, 1990 a police officer with the City of Anniston Police Department and a police officer with the City of Oxford Police Department responding to an anonymous telephone tip that an escapee from the State of Georgia was currently occupying a room at a local motel,

went to that motel and confronted the Defendant, Larry Gene Childs. Upon determining that Childs was wanted as a prison escapee from the State of Georgia, the said Defendant was taken into custody and transported to the Anniston Police Department. Thereafter, the store clerk who was on duty at the Discount Food Mart #107 on the night it was robbed, identified Childs as the person who robbed the store.

Childs was subsequently charged with robbery, was indicted for that offense and ultimately stood trial and was convicted."

REASONS FOR GRANTING THE WRIT OF CERTIORARI

QUESTION ONE

Whether the Trial Court and the Appellate Courts for the State of Alabama erred in denying the Petitioner a new trial on the basis that because of the unprofessional errors of the Petitioner's Trial Counsel:

1. The Petitioner was denied a fair trial and there is a reasonable possibility that the results of the proceeding at trial would be different; and,

2. The Petitioner's sentence was fundamentally unfair and there is a reasonable possibility that the Petitioner should not have been sentenced to a term of Life Imprisonment Without the Possibility of Parole.

There are four errors that the Petitioner points to as errors that are sufficient to constitute professional error under the first prong of the test announced in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2051

(1984). These are: 1. Trial Counsel failed to protect the 4th Amendment rights of the Petitioner in that he failed to investigate the circumstances surrounding the arrest of the Petitioner and thereafter failed to move to exclude from trial illegally obtained evidence; 2. Trial Counsel failed to investigate the circumstances surrounding the pre-trial identification procedure and as a result failed to object to an in-court identification tainted by impermissively suggestive pre-trial procedures; 3. Trial Counsel demanded over the protest of the Trial Judge that a jury instruction be given which shifted the burden of proof to the Petitioner that he must prove his alibi defense; 4. Trial Counsel failed to investigate the circumstances under which the Petitioner entered a plea to four prior burglary convictions which resulted in a "strategic" decision to cause the Petitioner to admit without reservation (that he had entered the plea without benefit of counsel) that he had committed those crimes. The result was that Petitioner was thereby making those prior convictions available for, and required to be considered under the Alabama Habitual Offender Statute and which when thus considered caused the Petitioner to have his sentence enhanced to one of Life Without The Possibility of Parole.

The State of Alabama passed § 15-9-40 *Code of Alabama* (1975) (App. 22-23) relating to the apprehension of persons alleged to have committed a crime in another state. Alabama has another statute, § 15-9-41 *Code of Alabama* (1975) (App. 23) which deals with the apprehension of persons found in that state and having committed an offense for which the punishment is death or life in prison. The Petitioner fell into the first category.

Although the Petitioner was arrested in direct violation of the statutes of Alabama, the Petitioner's Trial Counsel did not inquire into the circumstances of that arrest, and as a consequence, did not move to suppress the evidence gathered as a direct result of the arrest, including evidence which was actually admitted at trial. Counsel made no objection to the admission of this evidence. This failure was error, and denied the Petitioner's rights as guaranteed under the Fourth Amendment to the United States Constitution. This type of failure on the part of counsel for an accused has been held to be a violation of the accused rights' as guaranteed under the Sixth Amendment of the United States Constitution. *Kimmelman v. Morrison*, 477 U.S. 365, 91 L.Ed.2d 305, 106 S.Ct. 2574 (1986). The result was that the Petitioner was denied a fair trial because of the admission of the evidence otherwise inadmissible.

Counsel also failed to investigate the circumstance surrounding the pre-trial identification of the Petitioner. The entire strategy of trial counsel was the defense of alibi. After the arrest of the accused, he was taken in derogation of § 15-9-40 *Code of Alabama* (1975) to the Anniston Police Station, where, without benefit of counsel the accused was placed in an identity parade. Prior to that incident, the victim had been shown a photographic line-up in which the accused was extremely noticeable in that he was the only one in the photo parade that had "extremely short hair" (T. 358). In fact, although she testified that she did not look at the hair, only the facial features, she was able to remember that the other persons had long hair. Thereafter, the victim participated in an identity parade in which all the foils had "long greasy,

scrubby [sic] hair" with the accused having "extremely short hair" (T. 358-359). Trial Counsel did not talk to the victim concerning the photographic line-up or the identity parade. He relied on the victim's statement and a paralegal's interview as he was concerned about "interference with witnesses" (T. 403). As a result of his failure to investigate, he was not prepared to cross examine and did not cross examine the victim concerning the pre-trial identification procedures at the trial of the case. Trial Counsel did question the victim about a "mug shot" picture that resembled the accused, but was of a man named Michael White. However, the victim never said that "mug shot" photograph was the robber, she stated that she told the police that Michael White's photograph was similar to the accused. As a result Trial Counsel's failure to investigate the pre-trial identification procedure, the victim was allowed to make an in court identification which would otherwise be suppressed or limited.

Counsel demanded (App. 35-36) that the Trial Court give a jury instruction that was burden shifting in violation of *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). This error was prejudicial to the defense in that it shifted the burden of proof to the accused to prove his alibi defense. It prevented him from receiving a fair trial in that the charge put in the jury's mind that the accused had a duty to present unimpeached proof of his alibi.

Trial Counsel did not investigate the circumstances surrounding the Petitioner's prior plea of guilty to four burglaries. Trial Counsel had a conversation with an attorney, Mr. John Clark, concerning the prior conviction.

Trial Counsel was told that a "waiver" was in the clerk's file in the jurisdiction of the court accepting the plea. Had counsel made even a cursory examination of the "waiver" he could have, would have developed a different strategy concerning these prior convictions. First, the document (App. 14-21) contains numerous references to the Petitioner's counsel advice concerning the entry of the plea of guilty. However, the document shows that the Petitioner also waived counsel. These statements are irreconcilable. The Petitioner had no counsel at the time he entered that plea. This "waiver" was not available to the prosecution on the date of the trial of the case, and therefore the convictions were unavailable for use to impeach the Petitioner or to be used to enhance sentencing. Notwithstanding that, Trial Counsel elicited testimony that contained no reservation at all as to the age of the Petitioner when he entered his plea (18), whether he had an attorney (he did not) and whether the "waiver" was a knowing and voluntary one which the Petitioner contends was not. The devastating effect was that this admission without reservation required the Trial Judge to enhance the Petitioner's sentence from one that had a range from fifteen years to life, to one where the sentence of the court was a mandatory Life Without Parole. The findings of the court in its Habitual Offender Sentencing Order (App. 6) show that the court took into consideration that the Petitioner admitted the prior convictions at trial, but did so without reservation. (App. 6). Without the admission at trial, the outcome of the sentencing hearing would have been much different. The burden to show the voluntariness of the plea for those four prior convictions would have shifted to the state once the

document was shown to be contradictory and that the plea was taken without advice of counsel. The professional errors in allowing the Petitioner to admit without reservation the four prior felony convictions violated the Petitioner's Sixth Amendment right to counsel and rendered the sentence unfair and unreasonable and but for the unprofessional errors the results at trial and sentencing would have been quite different.

The two components for claims of ineffective assistance of counsel set out in *Strickland* are: (1) deficient performance and (2) prejudice. *Strickland,* supra. However, an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. *Lockhart v. Fretwell,* 506 U.S. ___, 113 S.Ct. ___, 122 L.Ed.2d 180 (1993).

The State in its arguments point out that Trial Counsel for the accused put on an elaborate alibi defense of some eight witnesses. It further argues that what Petitioner points to as error and what the Petitioner contends vitiated that trial strategy is strategy within the purview of professional decision making. Therefore, the State argues, there can be no Sixth Amendment violation because the trial was neither fundamentally unfair nor the verdict and sentence unreliable. Indeed, the Court of Criminal Appeals held that the Petitioner had not shown that the outcome would be different and that the Petitioner had not shown any prejudice.

The Petitioner has shown that the outcome would have been different at trial and sentencing but for the

unprofessional errors of Trial Counsel. The Petitioner urges that prejudice also has been shown.

Prejudice flows from the denial of a procedural or substantive Constitutional right enumerated in Amendments One through Nine of the United States Constitution to which he is otherwise entitled as they existed at the time of his trial, and this denial must be shown to have denied the accused of a fair trial as judged contemporaneously. *Lockhart*, supra.

The Petitioner urges the Court to review the Trial Judge's ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL. (App. 8-11). In that order, the Trial Court finds a violation of an Alabama statutory law. However the judge decides that the outer limits of Constitutional Law limits the outer limits of Police action, but these outer limits do not, in his opinion, extend equally in space, time or scope, to the outer limits necessary from a societal or legal standpoint such that those societal and legal limits exist from a past time. He therefore feels that he cannot find that the pursuit of the Constitutional Rights of the Petitioner in such a circumstance can be reconciled on the trial court level. He therefore asks for the due process analysis of the appellate courts to reconcile this difference. It is the position of the Petitioner that the Court of Criminal Appeals for the State of Alabama made no such analysis, relying instead on the State's argument that the errors pointed to were not sufficient under the *Strickland* analysis.

The result of the decision of the Trial Court to defer to the Court of Criminal Appeals and the refusal of that court to reconcile the denial of the Petitioner's Fourth

Amendment Rights and the Petitioner's Sixth Amendment rights to effective assistance of counsel means that both courts have effectively abdicated the necessary fairness analysis on the premise that there was no professional error in the failure to file a motion to suppress. However, the Trial Court was unwilling to rule specifically on that point, and the Alabama Court of Appeals uses outcome determination as a separate analysis from the prejudice analysis.

The Petitioner argues that he has met the burden of showing professional error sufficient under *Strickland,* and that there is a reasonable probability that but for those errors the outcome would have been different and that no court has considered whether or not the trial and sentence of the Petitioner was fair and reliable in its result.

QUESTION TWO

Whether the use of a prior felony conviction entered without the benefit of counsel, but which is admitted to by the Petitioner at his trial can be used to enhance the sentence of the Petitioner.

In 1983 the Petitioner was an eighteen year old with a ninth grade level of education. He was residing in a small town in Georgia. The Petitioner entered a plea of guilty to four counts of burglary on one indictment. This plea has now formed the foundation for enhancement under the Alabama Habitual Offender Sentencing Act.

The record contains a document that the state contends shows that the plea of the Petitioner was a voluntary and knowing one and which showed that the Petitioner waived his right to counsel. The document is unclear with respect to the voluntariness of the entry of the guilty plea and is especially unclear as to waiver of counsel.

Consider the following responses given by the Petitioner to questions 10, 11, 12, 33 and 34 of the Petition to Enter Plea of Guilty:

* * *

10. Have you had enough time to talk with your lawyer about your case? answer: yes

11. Have you discussed your case fully and explained everything you know about it to your lawyer including all of the facts and circumstances surrounding any statement confession or other evidence obtained from you by anyone? answer: yes

12. Has your lawyer advised you of the nature of the charges against you and any possible defenses you may have including the right to challenge the legality of any statement, confession or other evidence obtained or seized from you? answer: yes

* * *

33. Has your lawyer gone over all these questions and your answers to them with you? answer: yes

34. Are you satisfied with your lawyer and the way he has represented you in this case. answer: yes

* * *

(App. 15, 19).

Later in the document, in a section entitled CERTIFICATE OF COUNSEL appears the handwritten word "waived".

The Petitioner had no lawyer and the responses essentially leave the record silent as to whether he effectively waived counsel in that plea. The handwritten word "waived" is not sufficient as a finding of the judge in this regard. *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

It is the Petitioner's contention that this document is insufficient as a matter of law to show that the convictions were obtained by a valid waiver such that they could be used by the state, without further proof by the state, for enhancement of the Petitioner's sentence. *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). The Petitioner argues that for such a document to be used against him in trial or sentencing is a violation of the Sixth Amendment. One cannot reasonably take the position that the Petition was advised by counsel and waived his counsel. The contradiction is such that the document should not have been used for sentencing in this case because the state did not meet the burden of proof that the convictions were the result of a knowing, voluntary plea of guilty with a valid waiver of counsel. The introduction of inadmissible convictions is reversible error unless the improper introduction is "harmless beyond a reasonable doubt". *Burgett*, supra, at 115.

CONCLUSION

For all of the above reasons the Petition For Writ of Certiorari to the Alabama Court of Criminal Appeals is due to be granted.

Respectfully submitted,

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[Released November 13, 1992]

Court of Criminal Appeals

State of Alabama
Judicial Building, 445 Dexter Avenue
Montgomery 36130

JOHN PATTERSON
Presiding Judge
WILLIAM M. BOWEN, JR.
SAM TAYLOR
H. WARD McMILLAN
MARK G. MONTIEL
Judges

Clerk's Office
(205) 242-4590

CR-91-899

Calhoun Circuit Court
(CC-90-931)

Larry Gene Childs v. State

Affirmed by memorandum. The appellant's argument that the trial court erred by enhancing his sentencing pursuant to §13A-5-9, *Code of Alabama* 1975, when it considered his four prior Georgia convictions for burglary which he received without benefit of counsel is without merit. Appellant admitted on direct examination and on cross-examination to the prior convictions. *Perry v. State*, 568 So. 2d 873 (Ala. Cr. App. 1990).

The appellant's argument that the trial court erred in denying his motion for new trial based upon his ineffective assistance of counsel claim. Some of the alleged errors fall within the category of strategic choices, while other alleged errors did not constitute unprofessional conduct. Additionally, some grounds are unsupported by the record. Despite any alleged errors that defense counsel might have made, the record reveals that there is no

reasonable probability that, but for those unprofessional errors, the outcome of the appellant's trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). Moreover, the appellant has failed to show any prejudice by the alleged errors. *Twyman v. State*, 565 So. 2d 1215 (Ala. Cr. App. 1990).

The appellant's argument that the trial court erred in denying his motion for judgment of acquittal due to insufficient evidence presented by the state is without merit. The record reveals that ample legal evidence was presented, which if believed by the jury, could sustain his verdict of guilt.

ALL THE JUDGES CONCUR

COURT OF CRIMINAL APPEALS

State of Alabama
Judicial Building, 445 Dexter Avenue
Montgomery 36130-1555

WILLIAM M. BOWEN, JR.
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Court of Criminal Appeals No. 91-899
(Calhoun Circuit Court No. 90-931)

Larry Gene Childs, Jr. vs. State of Alabama
Appellant Appellee

Dear Sir or Madam:

You are hereby notified that on **December 30, 1992**, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

Application for rehearing **overruled**. Rule 39(k) motion denied.

LANE MANN
CLERK
COURT OF CRIMINAL APPEALS

Hon. Ronald L. Allen
P.O. Box 36
Anniston, AL 36202

Hon. John A. Beall, IV
122 South Main Street
Jonesboro, GA 30236

THE STATE OF ALABAMA——JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

February 19, 1993

1920559

Ex parte Larry Gene Childs, Jr. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Larry Gene Childs v. State) (91-899) (Calhoun: CC-90-931)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

SHORES, J. – Hornsby, CJ., Maddox, Houston and Kennedy, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

witness my hand this 19 day of Feb1993.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

STATE OF ALABAMA, Plaintiff, Vs. LARRY GENE CHILDS, JR., Defendant.	*	IN THE CIRCUIT COURT OF CALHOUN COUNTY, ALABAMA Case No. CC 90-931 (Filed August 5, 1991)

HABITUAL OFFENDER SENTENCING ORDER

The Defendant, Larry Gene Childs, Jr., having heretofore been found guilty by a jury of the Class A felony offense of Robbery 1st Degree, §13A-8-41 *Code of Alabama* (1975), and having thereupon been adjudged guilty of said offense by the Court, and this case now being heard by the Court pursuant to §13A-5-9, *Code of Alabama* (1975), and Rule 26.6, *Alabama Rules of Criminal Procedure* (ARCrp), on motion of the State of Alabama, and evidence having been presented to, heard, and considered by the Court; the Court hereby finds as follows:

1. The defendant was convicted in this case of Robbery 1st Degree in violation of §13A-8-41, *Code of Alabama*, 1975, which offense is a Class A felony.

2. Subsequent to his conviction and prior to the instant hearing, the State gave notice to the Defendant and his attorneys of the prior convictions upon which the State intended to proceed in seeking to have the Defendant sentenced as a habitual felony offender, said notice being given in accordance with Rule 26.6 ARCrP. The Court finds that the notice given to the Defendant and to his attorneys by the State of Alabama was timely and reasonable.

3. The Defendant was represented by counsel at both trial and the subsequent sentence hearing.

4. At the sentence hearing the State produced evidence of five (5) prior felony convictions of the Defendant by the introduction of exemplified copies of indictments, minute entries, sentences and supporting papers (State's Exhibits 1, 2, 3, and 4). Each of the offenses reflected in this State's Exhibits and for which the Defendant had been previously adjudged guilty were felonies when and where committed, would have been felonies in the State of Alabama and constitute felonies under present Alabama law.

5. From the evidence presented by the State as reflected in State's Exhibits 1, 2, 3 and 4 and the prior testimony of the Defendant during the trial of this case, the Court finds that the Defendant presently before the Court, namely, Larry Gene Childs, Jr., is the same named Defendant as reflected in State's Exhibits 1, 2, 3 and 4.

6. The Court further finds that in Criminal Action 82-R-440-B, styled *State v. Larry Gene Childs*, Superior Court of Elbert County, Georgia, the Defendant specifically waived the assistance of counsel and was found by the Honorable George H. Bryant, Superior Court Judge, to have properly done so. The Defendant asserts that he did not effectively waive the assistance of counsel in said cases and that said cases cannot be used to enhance punishment in this case. However, the Court finds that the Defendant has not rebutted the findings of said Court in that regard and further finds that the Defendant admitted these convictions without reservation at the trial of this case and is only now attempting to go behind the

record in those cases to raise this issue. The Court further finds that the Defendant was represented by counsel in his fifth felony conviction in the State of South Carolina.

The foregoing considered, the Court finds that the Defendant, Larry Gene Childs, Jr. had been previously convicted of five felonies and after such convictions and adjudications then committed and has been convicted of Robbery 1st Degree, a Class A Felony. The Defendant is thus due to be sentenced to a term of imprisonment to the State penitentiary of life without possibility of parole. This Court does so order the Defendant, Larry Gene Childs, Jr. to the State penitentiary of the State of Alabama for a term of life in prison without possibility of parole.

Done and ordered this 5th day of August, 1991.

/s/ Samual H. Monk
SAMUEL H. MONK, II
Circuit Judge

STATE OF ALABAMA, Plaintiff, Vs. LARRY GENE CHILDS, JR., Defendant.	* * * * * * * *	IN THE CIRCUIT COURT OF CALHOUN COUNTY, ALABAMA Case No. CC 90-931 (Filed Feb. 21, 1992)

ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL

The Defendant in the above-styled case was convicted of Robbery in the First Degree on March 20, 1991. He was sentenced to life in prison without possibility of parole on August 1, 1991. The instant Motion For New Trial was thereafter filed. The Court's deadline for ruling on the Defendant's motion has been extended by the Court from time to time with the consent of the District Attorney and the Defendant's attorneys.

The Court has considered the Defendant's motion and the arguments made by the Defendant's attorneys and the State in response thereto. For the purposes of this motion the following minimum recitation of facts is made.

> "During the late evening hours of May 14, 1990, the Discount Food Mart #107 on Choccolocco Road in Anniston, Calhoun County, Alabama, was robbed by a white male. Taken in the robbery was an undetermined amount of cash and a six pack of Budweiser beer.
>
> On May 16, 1990, a police officer with the City of Anniston Police Department and a police officer with the City of Oxford Police Department responding to an anonymous telephone tip

> that an escapee from the State of Georgia was currently occupying a room at a local motel, went to that motel and confronted the Defendant, Larry Gene Childs. Upon determining that Childs was wanted as a prison escapee from the State of Georgia, the said Defendant was taken into custody and transported to the Anniston Police Department. Thereafter, the store clerk who was on duty at the Discount Food Mart #107 on the night it was robbed, identified Childs as the person who robbed the store.
>
> Childs was subsequently charged with robbery, was indicted for that offense and ultimately stood trial and was convicted.

The Defendant's attorneys in their motion and briefs set out multiple grounds for relief. However, the Defendant's principal arguments attack the competence of his trial counsel. The Defendant asserts that his trial lawyer's failure to file and pursue a motion to suppress was so prejudicial to the Defendant that it denied him a fair trial; that the Defendant was arrested and taken into custody by police officers acting without probable cause in violation of Sections 15-9-40 and 15-9-41 of the *Code of Alabama;* that the Defendant was not arrested by a deputy sheriff, was not placed in the custody of the Sheriff and was not taken before a judicial magistrate as required by the provisions of the *Code of Alabama* governing the arrest and detention of fugitives from another state; and that the identification of the Defendant by the victim in this case was based entirely upon an illegally obtained photograph and line-up that was constitutionally suspect. The Defendant asserts that his trial counsel's failure to move to suppress the identification of the Defendant and the

evidence used against him at trial as being the products of an illegal arrest, search and seizure, was so gross as to amount to a violation of the Defendant's constitutional right to effective assistance of counsel.

It appears to be without question that the Defendant was arrested by municipal police officers acting on an anonymous tip and without a warrant and that the initial identification of the Defendant was made by the victim viewing a photograph of the Defendant taken by police officers subsequent to his arrest and during that period of time he was being held without a warrant and without having been taken before a judicial magistrate. It is further apparent that no requisition had been issued by the State of Georgia and, in fact, the police officers arresting the Defendant did not have any official verification of the Defendant's fugitive status or of his identity. It is further without question that the Defendant did not stand charged with or convicted of a crime in the State of Georgia which was punishable by death or life imprisonment, statutory exceptions to the mandated use of a fugitive warrant.

The Court finds that the appellate courts of this state have not always required strict and unyielding observance to the statutory niceties set out in the *Code of Alabama* in arresting fugitives from other states. Clearly, in this day of near instant communication, ease of travel and reliability of law enforcement computer networks, the archaic and time-consuming provisions of Title 15 must be applied in such a manner as to deal with the realities of the situation. It is clear that constitutional requirements dictate the outer limits of permissible police conduct in this area; however, the outer limits from a

constitutional standpoint and the outer limits from a societal or legal standpoint may not be coextensive, the latter being at times more retroactive. The trial courts of this state are the last equipped to set the parameters within which the police agencies of this state must operate in the apprehending of interstate fugitives in our mobile society, such job being best left for the appellate courts.

In regard to this argument, the Court specifically finds that it cannot hold the conduct of the Defendant's attorney in failing to pursue the arguments now made to the Court rises to such a degree as to require the Court to find such conduct ineffective assistance of counsel as a matter of law under the *Strickland v. Washington* test currently utilized in evaluating the same.

The Defendant's attorneys assert various other grounds of alleged professional incompetence on the part of the Defendant's trial counsel. They basically argue these grounds individually and collectively asserting that the totality of the collective circumstances, if nothing else, amounts to a constitutional failure of effective assistance of trial counsel by the Defendant's attorney. The Court does not find such to be as clear and imperative as asserted by the Defendant's present attorneys.

The motion for new trial filed by the Defendant, having been considered, is hereby expressly denied.

Done and ordered this 21st day of February, 1992.

/s/ Samuel Monk
SAMUEL H. MONK, II
Circuit Judge

I HEREBY CERTIFY THAT I HAVE SERVED A COPY OF THE FOREGOING TO Dr. R. Allen, J. Beall Illegible
ON THIS THE 24th DAY OF February 1992

BARBARA CRAFT
CIRCUIT CLERK

BY /s/ Petra L. Thomas

VERDICT

EXCERPTED FROM TRIAL TRANSCRIPT PAGES 307-308

* * *

THE COURT: Has the jury reached a unanimous verdict in this case?

JUROR PATTERSON: Yes, we did.

THE COURT: The verdict form that you signed, does that reflect the jury's unanimous verdict?

JUROR PATTERSON: Yes, it does.

THE COURT: Is that the individual verdict of each juror, also?

JUROR PATTERSON: It was the individual secret ballot verdict of each individual.

THE COURT: Thank you. I read the verdict, "We, the Jury, find the defendant guilty of Robbery in the First Degree and charged in the indictment in this case," signed Antoinette G. Patterson, forelady. Anything for the State?

MR. GRUENEWALD: No.

THE COURT: Anything for the defense?

MR. OWENS: We ask that they be polled, Your Honor.

* * *

STATE'S EXHIBIT #2

IN THE SUPERIOR COURT
FOR THE COUNTY OF ELBERT
STATE OF GEORGIA

STATE OF GEORGIA, Plaintiff	)	
VS	)	CASE NO.
	)	82R-440-B
Larry Gene Childs, Jr., Defendant	)	

PETITION TO ENTER PLEA OF GUILTY

I, the above named defendant, hereby state to the Court that I wish to enter a plea of GUILTY to the above numbered indictment.

In connection with that plea of GUILTY, I inform the Court that the answers to the following questions are true:

1. What is your name? Larry Gene Childs, Jr.
2. What is your age? 18
3. How much education have you had? 9th

4. Are you able to read and write?	Yes ✔.	No __.
5. Are you now under the influence of any alcohol, intoxicants or any drugs?	Yes __.	No ✔.
6. To your knowledge, do you now suffer from any mental or emotional disability?	Yes __.	No ✔.
7. Have you received a copy of the indictment in this case?	Yes ✔.	No __.

8. Have you read it or had it read and explained to you? Yes ✔. No __.

9. Do you fully understand the charges against you? Yes ✔. No __.

10. Have you had enough time to talk with your lawyer about your case? Yes ✔. No __.

11. Have you discussed your case fully and explained everything you know about it to your lawyer including all of the facts and circumstances surrounding any statement, confession or other evidence obtained from you by anyone? Yes ✔. No __.

12. Has your lawyer advised you of the nature of the charges against you and any possible defenses you may have including the right to challenge the legality of any statement, confession or other evidence obtained or seized from you? Yes ✔. No __.

13. Do you understand that you have a right to plead NOT GUILTY to every charge filed against you? Yes ✔. No __.

14. Do you understand that if you plead NOT GUILTY you have a right to a speedy and public trial by a judge and jury? Yes ✔. No __.

15. Do you understand that if you plead NOT GUILTY you have a right to confront, that is to see, hear, question and cross-examine the witnesses called to testify against you at trial? Yes ✔. No _.

16. Do you understand that if you plead NOT GUILTY you have a right to use the subpoena power of the Court to require the attendance of any witnesses on your behalf, whether they want to come or not? Yes ✔. No _.

17. Do you understand that if you plead NOT GUILTY you have the right to testify or not testify, as you choose, that you cannot be required to testify and that if you do not testify the jury cannot take that as evidence against you? Yes ✔. No _.

18. Do you understand that if you plead NOT GUILTY you will be presumed to be innocent and that before you can be convicted the prosecution will have the duty of proving your guilt beyond a reasonable doubt? Yes ✔. No _.

19. Do you understand that, in the event you were convicted in a trial, you would have the right to appeal your conviction? Yes ✔. No _.

20. Do you understand that if you plead GUILTY you will have waived, that is, given up, each of the rights mentioned in questions 13 through 19? Yes ✔. No _.

21. Do you realize that if you plead GUILTY the Court may impose the same punishment as if you had pleaded NOT GUILTY and been convicted? Yes ✔. No _.

22. Do you know that the sentence you will receive is solely a matter for the judge to decide? Yes ✔. No _.

23. Have you been advised of the maximum punishment provided by law for the offense or offenses to which you want to plead GUILTY? Yes ✔. No _.

What is it? 80 years (20 yrs X 4 cnts Burglary)

24. Do you realize that if you plead GUILTY the Court may sentence you to the maximum punishment authorized by law for the offense or offenses to which you plead GUILTY? Yes ✔. No _.

25. If you are now on probation or parole, do you know that by pleading GUILTY here your probation or parole may be revoked and that you may be required to serve time in that case in addition to the sentence imposed upon you in this case? Yes ✔. No _.

26. If you are now serving another sentence, do you know that the sentence in this case could be made to follow the sentence you are now serving? Yes ✔. No _.

27. Has any person used any threats, force, pressure or intimidation to make you plead GUILTY? Yes _. No ✔.

28. Has any promise been made by anyone which causes you to plead GUILTY? Yes _. No ✔.

29. Has any person suggested to you or led you to believe that you will be placed on probation or be given a lighter sentence or otherwise rewarded for pleading GUILTY? Yes _. No ✔.

If so, who made the suggestion and exactly what was suggested?_____

_____

_____

30. Has any plea agreement been made by you with anyone which causes you to plead GUILTY? Yes _. No ✔.

If so, exactly what is that agreement, as you understand it?_____

_____

_____

31. Is your plea of GUILTY given voluntarily and of your free will and accord? Yes ✔. No _.

32. Did you commit the unlawful acts set forth in the charge or charges to which you want to plead GUILTY? Yes ✔. No _.

Specifically what unlawful acts did you commit? as alleged in indictment

33. Has your lawyer gone over all these questions and your answers to them with you? Yes ✔. No _.

34. Are you satisfied with your lawyer and the way he has represented you in the case? Yes ✔. No _.

35. Do you understand all these questions? Yes ✔. No _.

If not, which ones do you not understand? _____

36. Is there any other information or advice you want before you enter a plea of GUILTY? Yes _. No ✔.

37. Do you understand that if you plead GUILTY the Court may place you under oath and ask you questions about the offense or offenses to which you have pleaded and the answers to these questions may later be used against you in a prosecution for perjury or false statement or in any proceedings challenging the entry of your plea? Yes ✔. No _.

38. Do you now want to plead GUILTY? Yes ✔. No __.

I, therefore, petition the Court to accept my plea of GUILTY.

This 7th day of ~~Nov.~~ Jan., 1983

/s/ Larry Gene Childe Jr.
DEFENDANT

Sworn to and subscribed
before me this 7th day
of Jan, 1983

/s/ Daniel J. Parker
Notary Public

CERTIFICATE OF COUNSEL

I, as attorney for the defendant, hereby certify that:

1. I have read and fully explained to the defendant all of the charges contained in the indictment or information in this case.

2. I have explained and discussed with defendant the facts and elements of the case which the prosecution must prove and the defenses that may be available to the charge or charges.

3. I have explained to the defendant the maximum penalty provided by law for the offense or offenses to which the defendant offers a plea of guilty and the possible consequences of a plea of guilty.

4. The plea of guilty offered by the defendant to the charge or charges accords with my understanding of the facts the defendant has related to me, is consistent with

my advice to the defendant, and in my opinion is voluntarily and understandably made.

5. To the best of my knowledge and belief the statements, representations and declarations made by the defendant in the foregoing petition are in all respects accurate and true.

6. I do not know of any reason why the Court should not accept the plea of guilty.

This _____ day of _____, 19___

waived

_____
Attorney for Defendant

ORDER

After examination by the Court, the Court ascertains, determines and adjudges, that the plea of guilty by the defendant is freely, understandingly and voluntarily made, and was made without undue influence, compulsion or duress, and without promise of leniency. It is, therefore, ordered that his plea of guilty be entered on the minutes, and that this Transcript and Certificate be filed with the (Indictment) (Accusation).

This 7 day of Jan., 1983

/s/ George H. Bryant
JUDGE, SUPERIOR COURTS
NORTHERN JUDICIAL
CIRCUIT

REPRODUCTION OF STATUTES OF CODE OF ALABAMA (1975)

Section Number 13A-5-9 [in relevant part] states that:

(c) In all cases when it is shown that a criminal defendant has been previously convicted of any three felonies and after such convictions has committed another felony, he must be punished as follows:

(1) On conviction of a Class C felony, he must be punished by imprisonment for life or for any term not more than 99 years but not less than 15 years;

(2) On conviction of a Class B felony, he must be punished for life in the penitentiary;

(3) On conviction of a Class A felony, he must be punished by imprisonment for life, without parole. (Acts 1977, No. 607, p. 812, 1235; Acts 1979, No. 79-664, p. 1163, 1.)

Section Number 15-9-40 states that:

Whenever any person within this state shall be charged on the oath of any credible person before any district or circuit court judge of this state with the commission of any crime in any other state, and except in cases arising under Section 15-9-34, with having fled from justice; or whenever complaint shall have been made before any district or circuit court judge in this state setting forth on the affidavit of any credible person in another state that a crime has been committed in such other state, that the accused has been committed in such other state, that the accused has been charge in such state with the commission of the crime, and except in cases arising under Section 15-9-34, that he has fled from justice

and is believed to have been found in this state, the judge shall issue a warrant directed to the sheriff of the county in which the oath or complaint is filed, directing him to apprehend the person charged, wherever he may be found in this state, and bring him before the same or any other district or circuit court judge who may be convenient of access to the place where the arrest may be made to answer the charge or complaint and affidavit. A certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant. (Acts 1931, No. 482, p. 559; Code 1940, T.14, 60.)

Section Number 15-9-41 states that:

The arrest of a person may be lawfully made also by an officer or a private citizen without a warrant upon reasonable information that the accused stands charged with a crime punishable by death or life imprisonment in the courts of another state. When so arrested, the accused must be taken before a district or circuit court judge with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in section 15-9-40, and thereafter his answer shall be heard as if he had been arrested on a warrant. (Acts 1931, No. 482, p. 559; Code 1940, T. 15, 61.)

EXCERPT OF TRANSCRIPT OF SENTENCING HEARING PAGES 316-317

* * *

[p. 316] notice –

MR. GRUENEWALD: Received notice of my motions.

MR. BEAL: No, I have no problem in stipulating I received notice after the trial of the case.

Your Honor, just for the record and since it appears that the State is going to go forward with the sentencing under the Habitual Felony Offender's Act I wonder if the Court would allow me just to perfect the record on some objections with respect to that at this time?

THE COURT: All right.

MR. BEAL: Your Honor, we would object to going forward under the act under the Fifth, Sixth, Eighth and Fourteenth amendments of the United States Constitution, the federal and state statutes, federal and state common laws, the federal and state procedural rules. And, also, Your Honor, we would object under the court provision of the Constitution of the State of Alabama.

Further, Your Honor, although there appears to be some case law against me we would additionally object to the use and the manner which the act is written in that it usurps the exclusive jurisdiction of the judiciary. It is cruel and unusual punishment under the Eighth Amendment. We object to [p. 317] the use of the act with respect to sentencing of this particular defendant. It violates due process. It's ex post facto that it requires a mandatory

sentencing. It's violative of equal protection in that similarly situated defendants are not treated the same; is unconstitutional. Application of the act is not rationally related to the crimes committed to the prior offenses or the analysis of proportionately under *Solem v. Helm*. And that the sentence of life without parole is violative – I'm sorry. I just – I had already raised that issue under the *Solem v. Helm* proportional.

Your Honor, we would ask that those be standing and continuing objections throughout the entire proceedings.

THE COURT: All right, Objections are noted and overruled.

MR. BEAL: Thank you, Your Honor.

MR. GRUENEWALD: And do we have a stipulation that we did give notice? I believe we already addressed that to the Court.

MR. BEAL: We received notice after trial of four felony convictions that the State was going to proceed under four felony convictions out of Elbert County, Georgia, and one felony conviction out of South

* * *

EXCERPT FROM APPELLANT'S BRIEF TO COURT OF APPEALS, STATE OF ALABAMA

* * *

STATEMENT OF ISSUES FOR REVIEW

Issue One

Whether the sentence imposed by the trial court shall have been enhanced to the sentence of Life Without Parole under code of Alabama Section 13A-5-9 wherein the trial court considered four prior convictions which were entered by the Appellant without benefit of counsel, as enhancement under the sentencing statute over objection.

Issue Two

Whether the trial court erred in denying the Appellant's Motion for New Trial because trial counsel was ineffective to such a degree that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different, *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Issue Three

Whether the Appellant is entitled to acquittal pursuant to the holding in the case of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560, rehearing denied (US) 62 L.Ed. 2d 126, 100 S.Ct. 195

* * *

EXCERPT FROM DEFENDANT'S MOTION FOR NEW TRIAL

* * *

7.

The Defendant moves this Court to set aside the verdict and to grant him a new trial for the reason that the Defendant was denied a fair and impartial trial because his trial counsel's performance was constitutionally inadequate generally, and, not in limitation to other acts of omissions hereinafter discovered and disclosed to the court that counsel committed the following errors by his acts and omissions each of which were below the standard of performance of reasonably effective assistance of counsel and taken together or separately violated the 5th, 6th, 8th and 14th Amendments to the United States Constitution, the correlative sections of the Constitution for the State of Alabama including, but not limited to, Article I, Section 6, 8, and 15 and Federal and Alabama statutory and common law. These errors include:

a. Counsel failed to properly investigate the facts and circumstances surrounding the circumstances and the validity of the Defendants' prior convictions. Trial Counsel never inquired personally or through an agent or other attorney or did he inquire of the Defendant that in case number 82-R-440-B, styled *State of Georgia v. Larry Gene Childs*, Superior Court of Elbert County, State of Georgia, that the Defendant entered a plea of guilty to four felony charges of burglary, without the advice or assistance of legal counsel.

* * *

EXCERPT FROM DEFENDANT'S MOTION FOR NEW TRIAL

* * *

extent of the deficiencies of trial counsel and to further show how the Defendant was prejudiced by his defective performance.

f. The Defendant was wrongfully arrested and held in direct violation of *Code of Alabama* (1975), Section 15-9-40, but counsel failed to raise this issue, or to move for the suppression of evidence obtained in violation of Defendants' unlawful seizure, which evidence was subsequently admitted without objection by trial counsel thereby prejudicing the Defendant in that the convicting jury had unlawfully obtained evidence presented to it.

9.

The Trial Court did not provide prompt, appropriate, curative instructions to remedy the negative impact of the District Attorneys' impermissible questions (T-92, 250) and arguments (T-289) as required under *Wilson v. State*, 571 So. 2d, 237, (Ala 1990).

10.

The sentence given to the Defendant is violative of the 5th, 6th, 8th, and 14th Amendments to the United States Constitution, and the correlative provisions of the Constitution for the State of Alabama, and against the law and *Code of Alabama* (1975), in that said sentence was enhanced improperly by the use of felony convictions in which the Defendant had not knowingly, intelligently, or

voluntarily waived his right to counsel, and therefore the Defendant moves this Court to set aside said sentence and held a rehearing on sentencing.

* * *

EXCERPT FROM TRANSCRIPT OF
MOTION FOR NEW TRIAL
PAGES 407-411

* * *

[p. 407] Q Okay. All right, sir. In connection with this case Mr. Childs came to testify that he had four prior burglary convictions, is that correct?

A That's true.

Q All right, sir. You did not, sir, know at the time that the trial was going on whether or not Mr. Childs was represented by counsel in those four prior convictions, did you, sir?

A I had been told by Mr. Clark, the attorney in Elberton, that the four convictions were there. That there was a waiver of counsel in there.

Q Did you obtain a copy of the waiver, sir?

A No, I didn't. I –

Q You had an open file with Mr. Gruenewald, did you not, sir?

A An open file?

Q Did you – you saw what was in Mr. Gruenewald's file?

A No. He gave me the things that I requested. He said, you know, "Essentially you have it." you never know whether you've got everything that's in a D.A.'s file.

Q Well, you did not – all right. He did not have counsel at that – at his prior burglary –

A My understanding is that Mr. Clark told me that because we were in this effort of – it came to a point where the offer being made to Mr. Childs and the risk of going to [p. 408] trial, I said, "Let me get everybody together." And at that discussion point we discussed his prior conviction. We discussed the fact that he was facing life without and that it was a situation where we, as I suggested to them, we should not risk that. That the plea would have been in his best interest and he chose to go to trial.

Q But you did not get a copy of the waiver?

A No, I didn't.

Q You did not look to see whether or not the waiver was valid?

THE COURT: Okay, Excuse me, just a minute. I'm sorry. I probably browbeat Mr. Gruenewald to the point of being paranoid to object. But those are matters that have been litigated, are a matter of record, and are subject to appeal on the Court's findings in the sentencing hearing in this case. I don't see where that has any bearing on what we're doing.

MR. BEALL: Your Honor, may I make a proffer with respect to that?

THE COURT: All right.

MR. BEALL: Your Honor, trial counsel, I believe, had he known that Mr. Childs was not represented by a lawyer at the time of [p. 409] the trial and had he further known that Mr. Gruenewald did not have a copy of the waiver, that the record would have been silent with respect to whether or not Mr. Childs had a –

was represented by counsel. Mr. Gruenewald did not have a copy of that waiver at that time.

On page eight of the sentencing transcript it shows that Mr. Gruenewald did not have at that time another a copy of the waiver, the so-called Boykin document. That would have made a substantial difference.

THE COURT: Excuse me. I see where you're going, Go ahead.

MR. BEALL: That would have made a very substantial difference in whether or not Mr. – the strategy of Mr. Owens was correct.

THE COURT: All right. Go ahead. I see your point.

MR. GRUENEWALD: Can I interpose something at this point about that, Judge?

THE COURT: Yes, sir.

MR. GRUENEWALD: Your Honor, I would submit [p. 410] that whether or not the State had a copy – had copies of the prior conviction or a waiver of the prior conviction in it's possession at that time is immaterial because the State has no obligation, that I know of, to furnish defense counsel with any such documents. And that the defense counsel –

THE COURT: That's not the direction he's going. The direction he's going is whether or not you could have in good faith asked Mr. Childs about his prior criminal record had he taken the stand, is the way I see that he's going.

MR. GRUENEWALD: I understand. And I was going to get to that Judge.

THE COURT: I understand. I see where it's along the same lines as where he's gone before. I'm going to overrule.

MR. BEALL: Thank you, Your Honor.

Q Mr. Owens, had you known that Mr. Childs did not have counsel would that have made a difference in you strategy?

A I was – I've already said that Mr. Childs had waived counsel. That was what I was told by Mr. Clark. That [p. 411] the convictions were there. That in Georgia – we talked about the indictments and how they were separated out and all that. That – all of those considerations were done at that. And I don't remember the date of this meeting on the phone. It was a telephonic meeting because I specifically asked him to get, I thought, his father there so I could explain to him what we were dealing with. Because Larry Gene was taking the position that there wasn't anything we were going to plead to. And I said, "Okay. I want to make sure everybody knows that we're on the same sheet of music here. Because I know you're facing life without and you need to know that and I think we all need to understand these things." So to answer your question of did I – would I have done something different. I knew that there had been a waiver. That's what I knew. That's all I knew. That's all I knew. But that was from Mr. Clark telling me in Elberton that that's what he knew.

Q You didn't get a copy of the waiver?

A No, I didn't.

Q You didn't inquire anything further into it?

A No, I didn't.

Q Sir, you submitted some requests to charge in this case?

THE COURT: Let me back up. Has there not been a judicial determination that those

* * *

EXCERPT FROM CHARGE OF COURT IN THE TRIAL TRANSCRIPT FOUND AT PAGE 305-306

* * *

[p. 305] read it closely it switches the burden of proof to you, to the defendant. And I think I covered it. If you read it that could be interpreted as switching the burden of proof to the defendant to reasonably satisfy the jury of alibi. And basically I have instructed them that if alibi raises in their minds a reasonable doubt then went on to tell them that the State still must prove the element. So the reason I didn't give it is I thought it was sort of risky.

MR. OWENS: Judge –

THE COURT: I'll give it if you want.

MR. OWENS; I want it. We're in a situation where we believe that we've got the weight of the evidence there. I think that's a key. That's one of the reasons that we found this one.

THE COURT: Well, I didn't do it's [sic] because by reading it it tends to switch the burden to the defendant. But I will. Okay?

MR. OWENS: Okay.

(Whereupon the side bar conference concluded after which the following occurred.)

THE COURT: All right, Ladies and Gentlemen, there has been one other requested charge that I overlooked in giving [p. 306] you. The fact that it's being given to you at this time and not basically in context with the other charges should not stress or make you think in your mind that it is any more or less important than any

other element of my charge to you. I just simply overlooked it and I apologize to you.

I would charge you, Ladies and Gentlemen, that if you are reasonably satisfied from the evidence in this case that the defendant was at some other place and was not at the discount Food Mart Number 107 on May the 14th, 1990, at the time and place testified to by the State's witnesses in this case then it would be your duty to find the defendant not guilty.

That concludes my charge to you, Ladies and Gentlemen. You'll have with you in the jury room the exhibits that have been introduced in this case, the two verdict forms I've gone over with you. If you will follow Mr. Hollingsworth you may retire and deliberate your verdict and signal us when you need to be returned to the courtroom. Thank you.

(Jury retired at 10:25)

EXCERPT FROM PETITIONERS WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

* * *

A copy of the opinion of the appellate court is attached to this petition marked as Exhibit "A" which shows the court of Criminal Appeals case to be number 91-899.

3.

Petitioner alleges that as grounds for the issuance of the writ the following:

a. One basis of this petition for the writ is that the decision if in conflict with the United States Supreme Court ruling in the case of *Strickland v. Washington*, 466 U.S. 668 (1984).

b. The second question is whether the admission at trial of prior felony convictions which are later show [sic] to have been without counsel can be used for sentence enhancement. *Burgett v. Texas*, 389 U.S. 109 (1967), *Donahay v. State*, 287 Ala. 716 (1971), *Nilson v. State*, 412 So.2d 1262 (1982), *Sargent v. State*, 515 So.2d 529 (1987).

4.

Petitioner respectfully requests that after a preliminary examination, the writ of certiorari be granted and that this court proceed under its rules to review the matters complained of, and to reverse the judgment of

the Court of Criminal Appeals, and for such other relief as Petitioner may be entitled.

* * *

EXCERPT FROM PETITIONER'S MOTION FOR NEW TRIAL FOUND IN RECORD AT C-27

* * *

7.

The defendant moves this Court to set aside the verdict and to grant him a new trial for the reason that the Defendant was denied a fair and impartial trial because his trial counsel's performance was constitutionally inadequate generally, and, not in limitation to other acts or omissions hereinafter discovered and disclosed to the court, that counsel committed the following errors by his acts and omissions each of which were below the standard of performance of reasonably effective assistance of counsel and taken together or separately violated the 5th, 6th, 8th, and 14th Amendments to the United States Constitution, the correlative sections of the Constitution for the State of Alabama including, but not limited to, Article I, Sections 6, 8, and 15 and Federal and Alabama statutory and common law. These errors include:

a. Counsel failed to properly investigate the facts and circumstances surrounding the circumstances and the validity of the Defendants' prior convictions. Trial Counsel never inquired personally or through an agent or other attorney or did he inquire of the Defendant that in case number 82-R-440-B, styled *State of Georgia v. Larry Gene Childs*, Superior Court of Elbert County, State of Georgia, that the Defendant entered a plea of guilty to four felony charges of burglary, without the advice or assistance of legal counsel.

* * *